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ABSTRACT

The simplification of legal language is required by President Carter's Executive Order requiring "clear and simple English" in government regulations. A major problem in the simplification process is the absence of any adequate description or classification of legal language. This paper defines some specific features of legal language, its functions within the legal community and society as a whole, and discusses some aspects of the simplification of legal language. Like any dialect, legal language serves separating, unifying, and prestige functions. In addition, it requires a lengthy acquisition process, undergoes change and growth, and has identifying syntactic features. Recent research suggests that there is more to legal language than lexicon. For example, a study of the comprehension of standard jury instructions points out several linguistic features which appear to typify legalese but are not common in other varieties of English. Attempts to simplify legal language have been generally of two types: (1) readability indices or formulas which measure symptoms of incomprehensibility; and (2) a rhetorical or editing approach that emphasizes the reader's point of view. It is suggested that research in the comprehension of nonlegal language can provide insight into the linguistic barriers to comprehension of legal language. (Author/AMH)

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LEGAL LANGUAGE: WHAT IS IT AND WHAT CAN WE DO ABOUT IT?

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INTRODUCTION

President Carter's Executive Order of March 1978 (No. 12044), which required "clear and simple English" as a means of Improving Government Regulations, was a landmark in the growing movement to make legal and bureaucratic language clear to the general public. The Executive Order was undoubtedly an outgrowth of the consumer movement and of the public's disillusionment with big business and big government: a manifestation of people's realization that they have little control over major portions of their lives.

One of the first institutions to attempt simplification of their documents was Citibank of New York: its loan forms were revised in an effort to translate cumbersome, legal phraseology into "common language." Other banks have since followed suit, as have numerous insurance companies; among them: Sentry, Massachusetts Mutual, and Penn Mutual. Even state governments have gotten into the act; for example, New York passed the Sullivan Law (known as the Understandable Language Law) which requires that consumer credit documents for amounts under $50,000 be clear and understandable. Senate Bill 1312 would amend the Truth-in-Lending Act to require the Federal Reserve Board to issue model loan forms written in "readily understood language" and the Magnuson-Moss Warranty Act (though regulations have not been written to implement it) requires warranties accompanying consumer goods to be written in "simple and readable language."

Even before the President's Order, several agencies had attempted to revise their regulations to make them more understandable. For example,

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the Federal Communications Commission revised their CB regulations to make it possible for the average CB owner to comply with them. HEW initiated "Operation Common Sense"; Albert Kahn, outgowing Chairman of the Civil Aeronautics Board, began rewriting every order that left his agency; and the Federal Trade Commission hired Readability experts like Rudolph Flesch. We think the prevailing attitude is best summed up in the words of the Chairman of the Interstate Commerce Commission, who said that, "English is a remarkably clear, flexible language. We should use it in all our communications."

WHAT IS LEGAL LANGUAGE, ANYWAY?

The problem is more complex than that, however. Many of these bills or agency directives are based on very little knowledge of what makes language difficult. Before we can effectively simplify legal documents or federal regulations, we need to know what is causing the difficulty in the first place. Most people would agree that the common denominator in all the difficult documents is legal language. But just what is legal language? There is no satisfactory description of this variety of English. Indeed, there is no consensus on what type of variety it is. Is it merely a jargon? A register? Could it be considered a dialect? The purpose of this paper is to investigate some of these possibilities and to suggest that legal language is more than a jargon.

We will begin by describing how lawyers have generally viewed their language. We will then look at some of the sociolinguistic functions of legal language and their consequences. We will even discuss some of the ways in which legal language looks like a dialect, considering such aspects as

the acquisition and socialization process lawyers undergo and the evolution of legal terms. In light of this, we will also look at some attempts at simplifying legal language and analyze their adequacy. We will end by discussing some areas of potentially fruitful research.

LAWYERS' VIEWS OF LEGAL LANGUAGE

Let's begin by looking at the ways lawyers have viewed their language. David Mellinkoff, Professor of Law at UCLA, describes legal language in his book, The Language of the Law (1963) largely in terms of vocabulary. He identifies nine characteristics of legal language:

1. Frequent use of common words with uncommon meanings (using action for lawsuit, of course for as a matter of right, etc.)

2. Frequent use of Old and Middle English words once in use but now rare (aforesaid, whereas, said and such as adjectives, etc.)

3. Frequent use of Latin words and phrases (in propria persona, amicus curiae, mens rea, etc.)

4. Use of French words not in the general vocabulary (lien, easement, tort, etc.)

5. Use of terms of art--or what we'd call jargon--(month-to-month tenancy, negotiable instrument, eminent domain, etc.)

6. Use of argot--ingroup communication or "professional language"--(pierce the corporate veil, damages, due care)

7. Frequent use of formal words (Oyez, oyez, oyez, which is used in convening the Supreme Court; I do solmenly swear; and the truth, the whole truth, and nothing but the truth, so help you God)

8. Deliberate use of words and expressions with flexible meanings (extraordinary compensation, reasonable man, undue influence)

9. Attempts at extreme precision (consider the following formbook general release:

> "Know ye that I,_____, of _____, for and in consideration of _____ dollars, to me in hand paid by _____, do by these presents for myself, my heirs, executors, and administrators, remise, release and forever discharge ____,of _____, his heirs,

> executors, and administrators, of and from any and all manner of action or actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, trespasses, damages, judgments, executions, claims, and demands whatsoever . . .")

I think you get the idea.

Reed Dickerson, a Professor Law widely known for his interest in legal writing and the author of The Fundamentals of Legal Drafting (1965) agrees with Mellinkoff that much legal language is ambiguous, wordy, and either overly precise or overly vague. And, in the words of Yale Professor Fred Rodell, legal language is "high class mumbo jumbo." As Rodell puts it, there are only two things wrong with most legal writing: one is style; the other is content (cited in Goldfarb, Barrister, Summer 1978).

Although some lawyers have urged simplification (for example, Wilbur Friedman, Chairman of the New York County Lawyers Committee and partner in a New York law firm), most members of the legal profession do not consider legal language a problem. Most lawyers assume that they are understood--that legal language is basically clear. In fact, the legal system largely proceeds on that assumption. As Roger Traynor (1970) noted, with regard to jury instructions, "in the absence of definitive studies to the contrary, we must assume that juries for the most part understand and faithfully follow (jury) instructions."

Where lawyers do see a problem, most assume it is the result of conceptual difficulty--that is, the legal ideas are the difficulty, not the wording of them. As Freidman puts it, "maybe real property law, deeds, and mortgages are so complex that no layman can ever be made to understand" them and lay people will simply have to depend on their lawyers to explain or simplify these documents to them (MacNeil/Lehrer Report, 1978). Interestingly, in a survey of 40 experienced trial attorneys, Charrow and Charrow (1976)

found that lawyers' ratings of the conceptual difficulty of 52 standard jury instructions bore little relationship to juror's actual comprehension of these instructions, and that when those which the lawyers viewed as most conceptually difficult were rewritten in simpler language, the jurors had far less difficulty in understanding them. In short, it was the language, not the ideas, which were difficult. In fact, the rewritten versions of these supposedly difficult instructions showed the greatest improvement in comprehensibility and became the easiest to understand.

What is particularly interesting--and dangerous--about legal language is that it is far more pervasive than most people realize and the average person's lack of understanding of it can affect them in serious ways. For example, besides the obvious use of legal language in the courtroom, it is also a part of insurance forms, leases, wills, warranties, and even parking stubs and theater tickets.

Lack of access to legal language--not only the comprehension of it, but also the ability to use it appropriately--forces the lay person to hire a lawyer for almost every important transaction in life. For example, buying a house, writing a will, getting a divorce, settling almost any dispute, almost always requires the services of a trained interpreter: that is, an attorney.

In fact, legal language may function for all non-lawyers as standard English does for all non-standard speakers: that is, as a means of control, not communication. (Cf. Williams, 1977; O'Barr et al., 1975) At this point, it would be profitable to look at the ways in which legal language functions sociolinguistically like a standard dialect.

LEGAL LANGUAGE: A DIALECT?

Like a standard dialect, legal language serves separating, unifying, and prestige functions. (Garvin and Mathiot, 1956) It separates lawyers from the common herd, because acquisition of legal language takes considerable time and study, and those who master it can use it to exclude all others. It also has a unifying function, in that the ability to use this language appropriately is all that is necessary to identify a lawyer. Unlike doctors who have instruments and procedures, engineers who have plans and formulas, or architects who have blueprints, lawyers have only their language as their principal tool and unifying feature. Mellinkoff recognizes this function when he describes a specialized vocabulary which lawyers use to speak with other lawyers as a principal characteristic of legal language.

Clearly legal language serves a prestige function as well: lawyers and courts serve as final arbiters in all disputes. A legal opinion on any matter is an important one. Banks, insurance companies, all major businesses, even government agencies, require large General Counsel staffs. Power is held by a few, and these are only lawyers, since legal language is largely impenetrable to those not socialized into it. Lawyers who write the contracts know what is in them and what they mean, but a lot of the rest of us--those of us who sign them and must live by them--do not. Evidence of the power and prestige that legal language gives an opinion is evident in the use of legal phrases in advertising. For example, in the sentence "This product is safe and effective when used as prescribed" which is found in many drug ads, the term <u>safe and effective</u> is used with its specific legal meaning drawn from the regulation (and not commonly understood as such), and the <u>caveat</u>, <u>when used as prescribed</u>, has a particular

legal function: it is there in case of a law suit.

There are other aspects which legal language shares with dialects. Like a dialect, legal language requires a lengthy acquisition process and a concommitant socialization into the legal culture. This acquisition process has not been studied in any formal way, but as one observer has put it: "Something strange happens when human beings enter law school. At some point during their three years, students pick up the notion that in order to be a lawyer, one must learn to speak and write like a lawyer. . . . By the end of three years, students barely can get through a letter or a conversation without dropping a few 'notwithstandings,' 'heretofores,' and 'arguendos'" (Goldfarb, 1978). In this respect, legal language may also be serving a frame-of-reference function, like that of any standard dialect. Legal language provides "a codified norm for correctness" by which "speakers can be judged in terms of their conformity to that norm" (Fasold and Wolfram, 1974).

Like a dialect, legal language also undergoes change and growth. The most obvious area of change is in the semantic field for various legal terms. Through litigation and appeal, as well as legislation, legal terms acquire new or extended meanings or have their meanings limited. Take, for example, the word voter, in the statute defining those eligible to serve on juries, which was passed before women could vote. After women earned that right, one court held that the word voter was +male; another held that it was both +male and +female. It was through legislation that the semantic field for the word voter expanded to include +female.

Like other dialects, legal language also retains older forms, resisting change. Many legal terms were current in ordinary English decades or even centuries ago, but are now archaic in standard English (consider

words like thereof, without let or hindrance, witnesseth, and other words and phrases only found in the King James Version of the Bible today). As a recent cartoon in the ABA Journal (October 1978) illustrates, Shakespeare's language in Hamlet is not far removed from some aspects of today's legal language: "Why not that be the skull of a lawyer? Where be his quiddities now, his quillets, his cases, his tenures, and his tricks?"

Legal language also has its own etymological process. For example, although motor vehicle could be used to describe a vehicle used on water, land, or in the air, an Appelate Decision by Justice Holmes in 1931 limited motor vehicle to refer only to something used on land, excluding airplanes from consideration. Although that meaning still holds, it is conceivable that a subsequent legislative decision could change it.

Legal language is certainly more than a special lexicon. It has syntactic features which identify it--which if they do not always differ from ordinary English in type, at least differ in frequency. Among these are: excessive use of multiple embeddings, passives (especially truncated passives), whiz-deletion, unclear anaphora, nominalizations, multiple negation, archaic and misplaced prepositional phrases, as well as the use of said and such as adjectives, redundancy and parallel structure, and unclear time reference. We will look at some of these examples now. It should be noted, however, that the examples presented here are not the result of hours of tedious searching. We pulled out one formbook at random and selected a form or two for analysis. Any other formbook or casebook would have done as well. The brief we used happened to be one that we had lying around, one that was used in a pending lawsuit. Again, any other brief would have provided similar examples. In short, the examples are indeed representative of legal language and were not chosen because they were the most bizarre. A simple sentence in legal

language is rare.

A LOOK AT SOME FEATURES OF LEGAL LANGUAGE

1. Multiple embeddings are egregious features of legal language. Take, for example, the following, which was part of a legal brief:

> "The requirement that affidavits in opposition to summary judgment motions must recite that the material facts relied upon are true is no mere formality."

Worse yet, consider this example from an orally presented California jury instruction, ironically called, Res Ipsa Loquitur--"the thing speaks for itself":

> ". . . However, you shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless you believe, after weighing all the evidence in the case, and drawing such inferences therefrom as you believe warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant."

As might be expected, those sentences which had the most embeddings were also the most difficult for jurors to understand in Charrow and Charrow's study (1978), even when the sentences were relatively short. For example, this sentence, which contains only 16 words, proved very difficult (with only 18% able to paraphrase it).

> "You must never speculate to be true any insinuation suggested by a question asked a witness."

Another difficult sentence with multiple embeddings is the following:

> "However, if counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively proved as to the party or parties making the stipulation or admission."

13.7% acceptable paraphrase; 39 words

2. Passives - The overuse of passives, especially truncated passives, is characteristic of legal language. Charrow and Charrow (1976) found 35 passives in the 44 sentences used in 14 jury instructions they tested; 27 of these 35 passives were truncated. This overuse of passive in legal language often results in inappropriate focus. For example:

> "The aforesaid representations were false and were then and there known by defendant to be false. . ." (American Jurisprudence Forms - fraud form)

Here the focus should be on the defendant and the fact that he knew these were false, not upon the representations known by the defendant. Only 14% of the jurors in Charrow and Charrow's study of jury instructions could paraphrase the following:

> "No emphasis thereon is intended by me and none must be inferred by you."

3 and 4. Whiz-deletion and Unclear Anaphora - The next example exhibits many characteristics of legal language besides passive voice and multiple embeddings. These are: whiz-deletion (the deletion of which is, that is, etc.) and unclear anaphora. The example is drawn from a fraud form:

> "That on or about ____, plaintiff discovered that the representations made by defendant were false and he thereupon elected to rescind the contract hereinabove referred to, notifying defendant in writing on _____ that he was rescinding the contract."

If you know how the legal system operates, you know that the he can only refer to the plaintiff; if you are not a lawyer, the reference is not very clear.

A combination of whiz-deletion and passive voice makes the next example from a jury instruction ambiguous:

> ". . . In determining the weight to be given such opinion, you should consider the qualifications and credibility of the expert and the reasons given for his opinion."

It is unclear whose reasons these are. In general, Charrow and Charrow (1978) found that whiz-deletion posed a problem for comprehension in jury instructions. The 16-word sentence cited before is a good example:

> "You must never speculate to be true any insinuation suggested by a question asked a witness."

The following example has both whiz-deletion and truncated passives:

> "However if assumption of the risk meets the requirements stated to you, it will bar recovery of damages. . ."

5. Nominalizations - In common with bureaucratic language, legalese is replete with nominalizations. Examples from one brief include: "made application" (instead of applied), "to plaintiff's detriment," and "demonstrates an entitlement to." California's Standard Jury Instructions provides this example:

> "Each of you must decide the case for yourself, but only after a consideration of the case with the other jurors."

One of our favorites is this one:

> "Failure of recollection is a common experience and innocent misrecollection is not uncommon."

Note the Biblical parallelism here.

6. Multiple negation - The last example also exhibits another problematic structure which is typical of legal language: multiple negation ("innocent misrecollection is not uncommon"). It's not surprising that not many jurors were not unable to paraphrase this: only 12% did. Part of Res Ipsa Loquitur provides another good example:

> ". . . that it is the kind of accident which ordinarily does not occur in the absence of someone's negligence."

Compare the more ordinary phrasing: It is the kind of accident which usually occurs when someone is negligent.

7. Archaic and Misplaced Prepositional Phrases are also a problem. Here is an example of a misplaced phrase:

> "If in these instructions any rule, direction, or idea is repeated (or stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you.)"

Another misplaced prepositional phrase occurs in the following:

> "A proximate cause is a cause which in natural and continuous sequence produces an injury . . ."

As to is particularly prevalent in legal language. Take the following example:

> ". . .You will regard that fact as being conclusively proved as to the party or parties. As to any question to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection."

8. Some Other Features - As many of you know, legal language has its own set of determiners. In addition to a, an, and the, it uses said and such and aforesaid where ordinary English would use this or that or these or those, for example, in such case or said person.

It would also appear to the untrained observer that lawyers fear stating things only once; consequently, they give multiple specifics rather than stating a generic, and use several synonyms in succession. Many of the examples we've provided exhibit this feature.

Inconsistent time reference is also characteristic, as in this

example:

> ". . . are now and at all times hereinafter mentioned were, co-partners." (fraud form 6)

9. A Final Example - For a final example, consider the old version of Citibank's loan form which contains passives, multiple embeddings, whiz-deletion, strings of prepositional phrases, nominalizations, redundancies, and excessive parallel structure, not to mention legal jargon:

> "In the event of default in the payment of this or any other obligation or the performance or observance of any term or covenant contained herein or in any note or any other contract or agreement evidencing or relating to any obligation or any collateral on the borrower's part to be performed or observed; or the undersigned borrower shall die; or any of the undersigned become insolvent or make an assignment for the benefit of creditors; or a petition shall be filed by or against any of the undersigned under any provision of the Bankruptcy Act; or any money, securities or property of the undersigned now or hereafter on deposit with or in the possession or under the control of the Bank shall be attached or become subject to distraint proceedings or any order or process of any court; or the Bank shall deem itself to be insecure, then and in any such event, the Bank shall have a right (at its option), wihtout demand or notice of any kind, to declare all or any part of the Obligations to be immediately due and payable, whereupon such obligations shall become and be immediately due and payable, and the Bank shall have the right to exercise all the rights and remedies available to a secured party upon default under the Uniform Commercial Code (the "Code") in effect in New York at the time and such other rights and remedies as may otherwise be provided by law."

No wonder Citibank's customers were delighted with the revised version, which read:

> "I'll be in default:
> (1) If I don't pay an installment on time; or
> (2) If any other creditor tries by legal process to take any money of mine in your possession."

ATTEMPTS TO SIMPLIFY LEGAL LANGUAGE

Clearly there is a need to simplify, but how to do that is a problem.

Attempts to simplify legal language have been broadly of two types: readability formulas, such as the Flesch Test, the Gunning "Fog Index," or the Fry Scale, and rhetorical approaches which utilize editing techniques and focus on stylistic concerns in an attempt to meet audience needs.

All of the nearly 50 readability formulas assume a surface level model of text comprehension. They all have a sentence variable and a word variable and assume that by counting the number of "long" words or "long" sentences, they can predict difficulty (relying most heavily on the word factor), (Klare, 1974-5, Kintsch and Vipond, 1977). But readability formulas only measure symptoms of incomprehensibility, not the causes of it. They pay no attention to specific complexities of word order, sentence construction, sequencing signals, or other discourse elements which could cause a sentence of only 16 words, as cited previously, to be difficult to comprehend. For example, John went to the store and Store John to the went would have the same readability score, since the formula makes no attempt to deal with word order. A more serious objection to readability formulas concerns their failure to consider discourse cohesion in their insistence upon short sentences. Take, for example, the following sentence: When Alice hit me on the shoulder, I cried, because I had recently broken my arm. If you cut this up into shorter sentences, and by readability formulas, simpler sentences, you get: Alice hit me on the shoulder. I cried. I had recently broken my arm. The result: certainly not more comprehensibility, since there is no text cohesion.

This is an extreme example, but it is meant to show what readability formulas can't account for. Worse yet, readability formulas are used inappropriately as criteria for rewriting documents, something even the proponents of these formulas caution against.

Psycholinguistic complexity depends on a great deal more than the number of words per clause or the number of clauses per sentence. It is not that readability formulas don't tell us anything; they just don't tell us enough, and often when they are predictive, they are so for the wrong reasons.

A second approach, used in most legal drafting courses and business and government writing seminars, is basically a rhetorical or editing approach. This type of approach is more helpful and may demonstrate the state of the art in clear writing. This approach emphasizes the reader's point of view, stressing the need for clarity, conciseness, and directness. Proponents of this approach suggest reducing nominalizations, passive voice, avoiding unnecessary repetition (or redundancy), which, interestingly, leads to deletion of that and to whiz-deletion, defining or reducing all jargon or unfamiliar terminology, increasing the use of transitional markers, and using a logical order with effective captions, numbering, and white space. Although many of these principles lead to effective rewriting, they are not based on linguistic theory or empirical evidence regarding comprehension, and rarely are revised or edited versions tested for their comprehensibility.

STUDIES OF TEXT COMPREHENSION

But there have been studies of text comprehension or discourse which can

be of use in simplifying legal language. Studies by Just and Carpenter (1971), Just and Clark (1973), and Clark and Chase (1972) have shown that negatives take longer to process than corresponding positive forms and that the more negatives, the more difficult processing becomes.

The relative processing difficulty of passives, however, appears to be contextually defined, as Huttenlocher and Strauss (1968) and Huttenlocher and Weiner (1971) found. The need for a special focus may make the use of passive voice desirable in some cases. Studies of abstract versus concrete words in sentences have shown the necessity of a context, as well, when dealing with more abstract concepts (Pezdek and Royer, 1974; Moeser, 1974; Marshark and Paivio, 1977). That's one reason impersonal constructions and nominalizations present a problem. In fact, many recent studies have emphasized the importance of context for text comprehension, as well as for recall of various types of discourse (Bransford and Johnson, 1972; Pepper and Prytulak, 1974; Underwood, 1977; Hupet and Le Bouedec, 1977).

Other considerations include the density of propositions or ideas in a text. As Kintsch and Vipond (1977) point out, comprehension is not a simple case of the number of words per sentence, but the number of propositions per sentence, especially if many of these are new propositions. Clark and Haviland's research (1974 and 1975) supports this, emphasizing the need to repeat propositions and to show the relationships between old and new information. These relationships need to be made very clear to the reader, since, as Kintsch and Vipond found, much difficulty in processing results from finding no obvious link to previous propositions, forcing readers to search back through the text or their memories for the former statement or proper context. Thus, the lack of connectors

or sequencing signals (what the rhetorical approaches refer to as transitional markers or effective repetition) do matter, and the number of words in a sentence is important, but only if that sentence has multiple embeddings or a number of new propositions.

FURTHER RESEARCH IS NEEDED

All of these comprehension studies need to be applied to legal language, and in addition, new research must be done, specifically on the comprehension of legal language. Charrow and Charrow's study of the Comprehensibility of Standard Jury Instructions is a beginning. They found that some of the conventional wisdom regarding what is clear and simple is not necessarily true of legal language (for example, the length of sentences, eliminating redundancies such as whiz-deletion) while other rules of thumb, are in fact, valid (difficulty of processing truncated passives, multiple embeddings, etc.)

Specifically, what we need to know is how lawyers acquire legal language: what are the stages and how does acquisition of legalese affect their nonlegal interactions? We also need to analyze the new revised and simpler loan forms or other documents and test them, not only to see if they are more comprehensible, but also to see which features are contributing to the increased comprehensibility. We might also look at the research in simplification done by people in ESL and EFL, specifically with simplified ESP texts, to see if what they have done relates to simplification for native speakers. That is, are there some features which are difficult for both limited English speakers and native speakers alike? Given recent studies in second language

acquisition, which show a surprising parallel between acquisition of first and second languages, we may find that there are some interesting similarities in what is difficult to understand. Since comprehension studies have shown that inadequate sequence signals contribute to difficulty, and since some work in ESL has found that sequence signals are among the hardest for even advanced ESL students, we may learn something from a comparison. Then, again, we may not. But we need to take a look.

We also need to take a closer look at the role of inference, presupposition, and Gricean maxims as they apply to legal language. The Gricean approach is especially appealing: to be informative or relevant in legal language may vary significantly from being informative or relevant in ordinary conversation.

Since the courts have not been eager to determine the understandability of legal language, perhaps because they lack the means to do so, someone (presumably linguists) will need to provide the courts with a methodology for measuring clear and simple English. This can be an exciting challenge to both the linguistic and legal communities, and we all stand to gain from it.

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